

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 7, 2009 Session

IN RE Z.V.S.P. AND F.A.P.

**Appeal from the Juvenile Court for Rutherford County
No. TC-910 Donna Scott Davenport, Judge**

No. M2009-00058-COA-R3-PT - Filed July 1, 2009

The trial court terminated Mother's parental rights to her two minor children upon a finding by clear and convincing evidence that grounds for termination existed and that termination was in the best interest of the children. Mother appeals; we modify and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed as Modified

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and ANDY D. BENNETT, J. joined.

Carl R. Moore, Murfreesboro, Tennessee, for the appellant, F.F.K..

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services.

OPINION

I. BACKGROUND

The Department of Children's Services ("DCS" or the "Department") first became involved with Mother and her two children in July 2006, when it received a referral that the children were not being supervised. Following an investigation into the referral where Mother tested positive for cocaine and benzodiazepines, Mother signed a protection agreement with DCS. On August 25, 2006, the children were taken into protective custody following a second referral that Mother had left the children with a neighbor for two days without leaving contact information; DCS arrived at the home where the children were staying and attempted to locate Mother through family and friends

without success. Mother arrived at the home few hours after DCS began looking for her and was arrested for child neglect; she was incarcerated in the Rutherford County Jail for 30 days.¹

On September 19, 2006, while Mother was incarcerated, DCS and Mother developed a permanency plan. Mother signed the plan, which was approved by the trial court on October 18, 2006. The plan established twenty-six tasks for Mother to complete by March 19, 2007, in order to accomplish the following outcomes: (1) to be drug and alcohol free; (2) to have a healthy and stable relationship with the children; (3) to provide monetarily for the children; (4) to have a better understanding of her parenting skills and her parenting needs; and (5) to comply with all orders of the court and rules of probation. The plan's stated goal was reunification with Mother or custody with relatives.

On September 22, while in jail, Mother completed an alcohol and drug assessment, which recommended intensive outpatient treatment. Mother was released on September 25. Upon her release, Mother lived in a motel for approximately two months before moving in with her "uncle" for a week or two.² Mother was able to return to her job as a janitor for Serv-Tech, a janitorial services company, though her hours were irregular such that some days she would work 8:00 A.M. - 5:00 P.M. while other days she worked 5:00 P.M.- 9:00 P.M. Mother did not work at the same location every day, rather she might be assigned to a different client each day located in other cities including Nashville or Lebanon. Mother did not have a home phone or cell phone during this time.

During the fall of 2006, DCS provided Mother with the names and contact information of outpatient treatment facilities as well as discussed housing options with Mother. Mother told DCS that she would prefer to participate in an inpatient treatment program; therefore, on October 12 DCS sent Mother a letter providing Mother with the names and contact information for several inpatient treatment facilities. During this time, DCS also arranged for Mother to undergo a parenting assessment with Dr. Kaforey. The October 12 letter also informed Mother that DCS had scheduled an appointment for Mother to meet Dr. Kaforey at the Department's offices in November; the letter included Dr. Kaforey's contact information and instructed Mother to call Dr. Kaforey directly if she needed to reschedule the appointment. Mother did not attend the appointment nor did she call Dr. Kaforey to reschedule. In November 2006, Mother provided DCS with a transportation plan and DCS offered to provide Mother with transportation to any service providers and to visitation as Mother did not have a driver's license or vehicle. Mother relied on her mother and other friends and relatives to provide transportation for her. Mother had supervised visitation during this time, but she missed one visitation in November.

¹ Mother testified that while she was charged with child neglect and served thirty days in jail, she was not convicted of child neglect; she stated, "I didn't get – they dropped it and I got it expunged off my record." The court noted there was no record of the child neglect charges in Mother's criminal record, which was entered into the court record as Exhibit 25.

² Mother testified that her "uncle" was an old friend who was not related to her.

On December 18, Mother was arrested on new criminal charges for theft of goods worth more than \$1,000 and was incarcerated for three days. Upon her release on December 21, Mother briefly went back to living with her “uncle,” but had to leave because his wife moved back in with him. She then lived with her mother for a few days before becoming homeless for the next three months.³

On January 2, 2007, the children were adjudicated dependent and neglected based on Mother’s homelessness and the children’s fathers’ abandonment. The trial court found DCS made reasonable efforts to prevent removal of the children; no appeal was taken from the trial court’s judgment.

Mother continued to have supervised visitation with the children during the first half of 2007, though there was some dispute whether Mother was visiting with the children at times not sanctioned by DCS. Mother admitted to visiting the children when they were participating in unsupervised visits with relatives. Mother believed such visitation was sanctioned by DCS, but once DCS learned of the visits the unsupervised visitation was stopped. Mother also missed two scheduled supervised visits with the children in February and March 2007, although the failure in March was apparently the result of mis-communication between Mother and the foster parents regarding the location of the visitation. In February, April and May 2007, Mother admitted to DCS that if tested she would test positive for marijuana. Also during this time, Mother attended three parenting classes, but stopped going before completing the eight classes required. In March, Mother told DCS that she intended to begin an outpatient treatment program with Pathfinders, but she did not complete the program.⁴

On June 3, 2007, Mother was arrested on new criminal charges and incarcerated after pleading guilty to possession of drug paraphernalia, theft, and resisting arrest. Mother remained incarcerated for the next five months during which she participated in a program that included parenting classes. Mother, however, stopped going after three classes because of an altercation she had with another member of the class. Upon her release on October 30, Mother moved in with her mother, who had since moved to a new apartment.

On November 11, 2007, a second permanency plan was developed, signed by Mother and approved by the trial court. The parental responsibilities assigned to Mother remained unchanged except for the additional requirement that Mother complete an intensive outpatient rehabilitation as recommended by the drug and alcohol assessment Mother completed in September 2006. The plan noted that Mother had completed the drug and alcohol assessment and that she had signed the necessary medical release forms allowing DCS to obtain documentation from Mother’s provider; however, no other tasks were marked completed by Mother. The plan set a goal date of February 7, 2008, and the overall goal of the plan changed from reunification with Mother or custody with

³ Mother testified that she could not continue living with her mother because she was not on her mother’s lease and she had recently been incarcerated; consequently, the landlord would not permit her to stay.

⁴ The record is not clear whether Mother actually started the program.

relatives to reunification with Mother or adoption as no relatives were able to accept custody of the children. DCS did a home study of the home where Mother was living and approved unsupervised visitation, which Mother exercised.

On November 24, 2007, Mother was arrested on new criminal charges of misdemeanor theft, but was released on bond the same day. On November 26, Mother tested negative for drugs. On January 21, 2008, Mother completed a parenting assessment and a second drug and alcohol assessment,⁵ which were provided by DCS and recommended in-home services to address Mother's alcohol and drug issues as well as parenting skills. On January 22, however, Mother was arrested for aggravated assault and was incarcerated after pleading guilty to simple assault as well as the charges stemming from her arrest on November 24 and violation of probation. Mother remained incarcerated, serving a four year sentence, through the date of trial.⁶

On February 11, 2008, DCS filed a petition to terminate the parental rights of Mother, the father of F.A.P., and the unknown father of Z.V.S.P.⁷ DCS sought termination of Mother's parental rights on the following grounds: (1) abandonment for failure to establish a suitable home; (2) substantial noncompliance with the permanency plan; and (3) failure to remedy persistent conditions that prevented her children's return.

On February 28, 2008, a third permanency plan was developed, signed by Mother and subsequently approved by the trial court. Mother's tasks remained the same in this plan, but eliminated the requirement for intensive outpatient rehabilitation. The plan acknowledged that Mother had completed the drug and alcohol and parenting assessments and had provided the results to DCS; the remainder of the tasks had not been completed. The plan established May 27 as the target completion date. A fourth permanency plan was developed on May 15, signed by Mother and subsequently approved by the trial court. This final plan's requirements remained the same, established a target completion date of August 15, and changed the overall goal to adoption only.

At the time of trial, the children were living with pre-adoptive foster parents and had not visited with Mother for approximately ten months, with the exception of a visit just before the beginning of the trial. Although Mother maintained contact with the children while they were in DCS custody, the children told Ms. Kendall, the DCS case worker, that while they did not want to lose all contact with Mother, they wanted to be adopted by their foster parents. A hearing was held on September 24 and October 30, 2008, and the juvenile court terminated Mother's parental rights

⁵ A second alcohol and drug assessment was required because it had been more than a year since Mother's first assessment and she had not completed any drug treatment.

⁶ In April 2008, Mother applied for furlough in order to get treatment, but the criminal court denied the request and ordered Mother to serve jail time. Mother was permitted to reapply for a furlough in October 2008, which she did. At the time of trial, it was unknown whether Mother's furlough would be approved.

⁷ The father of F.A.P. and the unknown father of Z.V.S.P. did not participate in the trial court and do not appeal the termination of their parental rights.

by order entered on December 3, 2008. The trial court found that DCS had made reasonable efforts to assist Mother in completing the tasks assigned to her, but that Mother had failed to do so. The court found by clear and convincing evidence that Mother had abandoned the children by failing to provide a suitable home; that she was in substantial noncompliance with the responsibilities of the permanency plans; and that she failed to remedy persistent conditions that prevented her children's return. The court also found that termination was in the children's best interests.

Mother disputes the trial court's determination with respect to all of the grounds for termination. Specifically, Mother contends that the trial court erred in ruling that DCS made reasonable efforts to assist her in providing a suitable home and that she made no efforts to provide a suitable home; in finding that there was a persistence of conditions based on what she characterizes as "mere incarceration" and that prolonging the parent-child relationship would diminish the child's chances of early integration into a safe and stable home; and, finally, in ruling that Mother failed to substantially comply with the permanency plan.

II. STANDARD OF REVIEW

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Terminating a person's parental rights "has the legal effect of reducing the parent to the role of a complete stranger." *In re W.B., IV.*, No. M2004-00999-COA-R3-PT, 2005 WL 1021618, *6 (Tenn. Ct. App. Apr. 29, 2005). Pursuant to Tenn. Code Ann. § 36-1-113(1)(1), "[a]n order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian."

Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re W.B.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). To support the termination of parental rights, petitioners must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. Code Ann. § 36-1-113(c).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about correctness of the conclusions drawn from

the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence “produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.* at 653.

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. As to the court’s findings of fact, our review is *de novo* with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

III. DISCUSSION

A. Reasonable Efforts of DCS to Reunify Mother with the Children

Mother’s parental rights were terminated based on three grounds: abandonment for failure to provide a suitable home; noncompliance with the parental responsibilities of the permanency plan; and persistence of conditions that led to removal of the children. Each of these grounds require the court to first determine whether reasonable efforts were made to make it possible for the children to return home. Tenn. Code Ann. § 37-1-166(a). The Department has the burden to demonstrate that reasonable efforts were made to assist the parent in order to make it possible for the children to return home. Tenn. Code Ann. § 37-1-166(b).

“Reasonable efforts” is defined to mean “the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family.” Tenn. Code Ann. § 37-1-166(g)(1). In determining the making of reasonable efforts, “the child’s health and safety shall be the paramount concern.” Tenn. Code Ann. § 37-1-166(g)(1). The reasonableness of DCS’s efforts depends on the circumstances of each case. The factors considered by courts in assessing the reasonableness of DCS’s efforts include the following:

(1) the reasons for separating the parent from his or her children, (2) the parent’s physical and mental abilities, (3) the resources available to the parent, (4) the parent’s efforts to remedy the conditions that required the removal of the children, (5) the resources available to the Department, (6) the duration and extent of the parent’s remedial efforts, and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department’s efforts.

In re Giorgianna H., 205 S.W.3d 508, 519 (Tenn. Ct. App. 2006).

While the Department maintains an affirmative duty to make reasonable efforts, the Department is not required to carry the entire burden. Accordingly, parents, too, must “make reasonable and appropriate efforts to rehabilitate themselves and to remedy the conditions that

required the Department to remove their children from their custody.” *In re Giorgianna H.*, 205 S.W.3d at 519; *see State of Tenn. Dep’t of Children’s Services v. V.N.*, 279 S.W.3d 306 (Tenn. Ct. App. 2008) perm. appeal den. Jan. 20, 2009.

The trial court found with respect to the Department’s efforts to make reunification possible:

The Rutherford County Juvenile Court adjudicated the children dependent/neglected on January 2, 2007. The children have been in foster care continuously since the Juvenile Court’s protective order. The Court has previously found that DCS had made reasonable efforts to avoid the removal. The Court found by clear and convincing evidence at the adjudicatory hearing that the mother had residential instability and was currently homeless.

DCS created a number of permanency plans. These plans listed numerous requirements for the mother to satisfy. The mother signed the initial plan on September 19, 2006, at the child and family team meeting held at the jail. She was involved in the meeting to develop the plan. DCS explained the requirements to her. On the first plan, she had until March 19, 2007, to comply. The responsibilities listed for the mother were reasonably related to the conditions which brought the children into State custody. DCS made reasonable efforts to assist the mother to comply with the requirements. They held multiple child and family team meetings at the jail[;] made available case management services[;] provided two alcohol and drug assessments; provided a parenting assessment; provided opportunities for outpatient and in patient treatment to help the mother gain control of her life; and provided foster care, housing, food, medical care and clothing for the children.

With respect to the efforts of Mother, the trial court found:

DCS held four child and family team meetings at the jail where [Mother] was incarcerated. DCS made reasonable efforts to help the mother establish a home. The Court has to consider that the mother was in and out of jail numerous times during this period of time over two years. Two alcohol and drug assessments were provided to the mother. DCS provided a parenting assessment and drug screens. Parenting classes were not available at the jail. The mother continued to pick up new criminal charges. There was very clear and convincing testimony that the mother was out of jail once for at least six consecutive months. During that time, DCS worked with the mother toward getting unsupervised visitation so that the children could progress toward returning home to her. The mother failed to do anything at all to improve her home condition or to fight for her children.

The mother still has no means of support for herself and her children. She has no home. She has been under the influence of drugs when she is not incarcerated. She has abandoned the children with acquaintances whom she knew to use alcohol or

drugs. She has had numerous arrests and incarcerations, even after removal of her children. She is limited as to what she can achieve while in jail. However, her multiple arrests and incarcerations are a result of her own voluntary action. These actions limit what DCS can do for her in the way of reasonable efforts. She has completed a weekly Bible course while in jail. She is trying to obtain a furlough for treatment, but there is no proof that she will obtain the furlough. The mother, from her own actions, has shown a disregard for her children, and she has not progressed toward making a home for them; the lack of stability still exists.

Mother contends that the Department failed to make reasonable efforts to assist her in several respects. First, Mother contends that there was no proof at trial that DCS provided Mother with the drug treatment that was recommended by the alcohol and drug assessment and that DCS should have known that their efforts to assist Mother to provide a suitable home for the children would be futile without Mother first completing drug treatment. Mother also contends that the DCS case worker, Amanda Kendall, maintained an overly heavy case load throughout most of the time that the children were in DCS custody thereby preventing her from fully communicating with and providing adequate services to Mother.

Within a month of removal and while Mother was in jail, DCS met with Mother to develop a permanency plan establishing responsibilities for both Mother and DCS to complete in order to make reunification with the children possible. Upon Mother's release from jail on September 25, 2006, DCS discussed housing options with Mother and provided her with a list of income-based housing as well as offered to pay her first month's rent. DCS also provided Mother with a list of outpatient drug treatment facilities. Mother expressed that she would prefer to attend an inpatient treatment facility and DCS sent a letter to Mother on October 12, providing her with the names and contact information for such facilities. There is no proof, however, that DCS offered to pay for Mother's drug treatment.

Mother contends that because DCS did not pay for her drug treatment, it should have known that all other efforts regarding the permanency plan were for naught. Mother cites *In re M.J.M.*, No. M2004-02377-COA-R3-PT, 2005 WL 873302, at *7 (Tenn. Ct. App. Apr. 14, 2005) for this proposition. In *In re M.J.M.*, DCS sought to terminate the parental rights of a mother of three children after the children were in DCS custody for only six months. The court held that given the severity of the mother's addiction to methamphetamines and the fact that the permanency plan established a one year goal for completing the assigned tasks, termination was premature since DCS "gave up" on the mother after only six months. *Id.* at *10-11. In addition to the fact that DCS prematurely "gave up" on the mother, the court found it significant that in the months before trial the mother had made extensive efforts towards completing the requirements of the permanency plan without any assistance from DCS; she had completed 95% of her drug treatment program, obtained housing, found a job, had access to transportation, cleared up all her pending legal proceedings and had obtained a referral to a psychiatrist for a mental health assessment. *Id.* at *11.

We find Mother's reliance on *In re M.J.M.* to be misplaced. Contrary to the circumstances in *In re M.J.M.*, DCS attempted to help Mother resolve her drug dependency for nearly two years after removal, but DCS was limited in what it could do for Mother's drug problem because of her repeated incarcerations. Moreover, the Department's efforts to help Mother with housing coincided with the Department's efforts to assist Mother with drug treatment. DCS provided Mother with an alcohol and drug assessment on September 22, 2006, while Mother was incarcerated. Upon Mother's release a few days later, DCS provided Mother with information on both out-patient and in-patient treatment facilities. Mother, however, failed to go to any of the treatment facilities in the two years following the children's removal. We also note that Mother's drug problems were not nearly as severe as those of the mother in *In re M.J.M.*⁸ With respect to whether the Department's failure to pay for treatment shows that the Department failed to make reasonable efforts, we find it does not. Mother was employed whenever she was not incarcerated. Moreover, there is no proof she asked DCS to pay for treatment or that she had difficulty paying for treatment.

Mother also contends that DCS did not make reasonable efforts to assist her because the case worker, Amanda Kendall, was assigned to handle too many cases. Mother contends that because of Ms. Kendall's overly heavy case load, Mother was frequently unable to communicate with her and as a result she did not receive all the services she required.

The record indicates that the parties had difficulty reaching one another by telephone, but there is no evidence that either DCS or the DCS service providers disregarded Mother's communication attempts. Mother was given Ms. Kendall's work and cell phone numbers as well as Ms. Kendall's supervisor's work and cell phone numbers. Mother also had the phone number for the DCS front desk where she could also leave a message for Ms. Kendall. Mother admitted that she had no home or cell phone in 2006, and while she testified that she had a cell phone in the spring of 2007, there was no proof that she provided DCS with that phone number. In fact, Mother told DCS that she should be contacted her through relatives or friends, who would in turn relay messages to her. There was evidence that Mother was difficult to reach by phone when she was not in jail and, while messages were often left with various individuals, Mother never returned the messages. Ms. Kendall testified that she would often have to call three or more different locations to contact Mother. Mother failed to update her contact information when she moved or became incarcerated; DCS learned of Mother's incarcerations through other sources.

Mother admitted that when she got out of jail in the Fall of 2007, she talked to the DCS case worker two or three times per week. Within a few weeks, however, Mother only contacted DCS every other week for about a month or so. Mother testified that after a few months "it was hard to get in touch with [Ms. Kendall]." Mother testified that when she called DCS she was only able to reach Ms. Kendall on the telephone "maybe 30 percent of the time." While Mother testified that Ms.

⁸ We do not mean to imply that marijuana or cocaine use do not cause serious addiction or dependency, but we merely point out that the court in *In re M.J.M.*, in holding that DCS had not made reasonable efforts because it had not continued to assist Mother to get drug treatment after six months of trying, placed great emphasis on the extreme destructive power of methamphetamines and the drug's high rate of recidivism as compared to other abused substances.

Kendall would return her calls “maybe 10 percent of the time,” Mother also admitted that they often played “phone tag.” There is insufficient proof that Ms. Kendall’s caseload detracted from the substantial efforts put forth by DCS.

The proof at trial showed that, in the nearly two years between the children’s removal and the trial, DCS held four family and child team meetings, often at jail; provided Mother with two alcohol and drug assessments as well as a parenting assessment (for which DCS had to request flex funding four times because Mother failed to attend the appointments made for her); discussed housing options with Mother including giving her a list of income-based housing and offering to pay Mother’s first month’s rent; and provided Mother with names and contact information for both outpatient and inpatient drug treatment facilities.⁹ The evidence fully supports the trial court’s finding that DCS made reasonable efforts to make reunification of the children with Mother possible; consequently, we affirm the trial court’s determination. Having found the Department made reasonable efforts, we will examine whether the evidence clearly and convincingly supports the termination of Mothers parental rights on each ground. We note that “termination of parental . . . rights may be based upon *any*” of the nine statutory grounds found at Tenn. Code Ann. § 36-1-113(g).

B. Abandonment for Failure to Provide a Suitable Home

A parent’s parental rights may be terminated when the parent abandons the child. Tenn. Code Ann. § 36-1-113(g)(1). “Abandonment” as respects this issue is defined as follows:

(ii) The child has been removed from the home of the parent(s) or guardian(s) as a result of a petition being filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department . . . that the juvenile court found . . . that the department . . . made reasonable efforts to prevent removal of the child . . . and for a period of four months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date...

Tenn. Code Ann. § 36-1-102(1)(A)(ii).

Mother contends that the facts do not support the trial court’s determination that DCS made reasonable efforts to assist Mother to establish a suitable home and that she made no reasonable efforts to provide a suitable home. Specifically, Mother asserts that she “had obtained a home, and was exercising overnight, unsupervised visitation during November 2007 through January 2008.”

⁹ The record also shows that DCS provided assistance to the children as required under the permanency plans.

Furthermore, Mother points to the fact that DCS made no allegation that the home was inappropriate and contends that “the fact that [she] was incarcerated during late January 2008 does not negate the fact that she made efforts.”

In considering this issue, the statute directs us to look at the four months following removal of the children. The children were removed from Mother’s custody on August 25, 2006, because the Mother was unable to provide a stable home or properly supervise the children. This was the second referral DCS had received regarding the children. In taking the children into custody, it was apparent that Mother’s drug use and frequent incarcerations contributed to Mother’s instability and inability to properly supervise the children.

Immediately following removal, Mother was incarcerated until September 25 based on her alleged neglect of the children. Mother did not find stable housing following her release at the end of September. For most of October and November, she lived either in a motel or with an “uncle.” She was briefly incarcerated again in the middle of December and in late December, she was unable to continue living at her “uncle’s” house because his wife returned. Mother admitted that despite the fact that when she was not in jail she had employment; she was nevertheless homeless from late December 2006, until March 2007. It was during this time period that the children were adjudicated dependent and neglected because of Mother’s homelessness. The juvenile court in that proceeding made a finding of fact that DCS made reasonable efforts to prevent removal of the children and Mother did not appeal the court’s judgment. We find the evidence clearly shows that during the four months following removal of the children, Mother made no reasonable efforts to find a suitable home for the children.

Looking beyond the four months following removal, Mother did find independent housing that she rented on a weekly basis and remained in this home until June 3, 2007, when she was again arrested on new criminal charges. Mother was subsequently incarcerated until October 23, 2007. Upon her release, however, Mother did not attempt to find an independent home; instead she lived with her mother. While DCS permitted Mother to have unsupervised visits with the children while she was living with her mother from November 2007 until January 21, 2008, Mother was yet again arrested and incarcerated on new criminal charges on January 22. Mother’s fourth arrest and incarceration stemming from her illegal actions since the children entered protective custody demonstrates Mother’s lack of concern for the children.

Part of providing a suitable home includes providing a stable living environment, basic needs for the children, and a safe environment with proper supervision. These were all parental responsibilities assigned to Mother to accomplish. Throughout the two years the children had been in DCS custody, Mother failed to live in the same place, other than jail, for more than three months. When she was in jail, Mother’s only choice was to leave the children with relatives or friends, many of whom were known to use drugs. Ms. Kendall testified that when she was looking for relatives with whom to place the children, she interviewed Mother’s mother as well as Mother’s aunt and uncle. Mother’s mother said that she did not have the means or ability to care for the children. Mother’s aunt and uncle were at one point the most promising placement for the children and a home

study was conducted. They began parenting classes. When they learned that in order to have custody of the children they would need to become drug-free, however, they indicated that they were no longer interested in becoming custodians for the children. Mother's record of frequent incarcerations, each stemming from new charges, and the fact that Mother again became incarcerated after her allegedly three "successful" months at the end of 2007, clearly shows that Mother has not changed her behavior for the benefit of the children. Not only has Mother continued her pattern of illegal behavior that results in repeated incarceration, when she was not incarcerated she had no stable home in which to live with the children. This is the situation that led to the children's removal in the first place. Consequently, we find there is clear and convincing evidence that Mother abandoned the children by failing to provide a suitable home.

C. Substantial Noncompliance with the Permanency Plans

Tenn. Code Ann. § 36-1-113(g)(2) provides that substantial noncompliance with a permanency plan is a ground for termination of parental rights. In order for noncompliance to justify the termination of parental rights, however, it must be "substantial." *In re S.H.*, No. M2007-01718-COA-R3-PT, 2008 WL 1901118, at *7 (Tenn. Ct. App. Apr. 30, 2008) (no Tenn. R. App. P. 11 application filed). Mere technical noncompliance by itself is not sufficient to justify the termination of parental rights. *See id.*

DCS is required to prepare an individualized permanency plan for each dependent and neglected child in its custody. Tenn. Code Ann. § 37-2-403. The requirements of the permanency plan "must be directed toward remedying the conditions that led to the child's removal from his or her parent's custody." *In re Tiffany B.*, 228 S.W.3d 148, 158 (Tenn. Ct. App. 2007) (citing *In re Valentine*, 79 S.W.3d at 547). In accordance with the permanency plans, DCS is obligated "to help parents become better able to provide their children with a safe and stable home and with consistent and appropriate care." *Id.* In conjunction with terminating a parent's rights on the ground of substantial noncompliance, the trial court must find that the requirements of the permanency plan that the parent allegedly did not satisfy are "reasonable and related to remedying the conditions which necessitate foster care placement." *In re Valentine*, 79 S.W.3d at 547 (quoting Tenn. Code Ann. § 37-2-403(a)(2)(c)).

Noncompliance with requirements in a permanency plan that are neither reasonable nor related to remedying the conditions that led to the removal of the child from the parents' custody is not relevant for purposes of Tenn. Code Ann. § 36-1-113(g)(2). *In re S.H.*, 2008 WL 1901118, at *7. Additionally, the parents' degree of noncompliance with a reasonable and related requirement must be assessed. *See id.* The issue of substantial noncompliance with the requirements of a permanency plan is a question of law; therefore, it is reviewed *de novo* with no presumption of correctness. *In re Valentine*, 79 S.W.3d at 546.

Mother disputes that she failed to substantially comply with the permanency plans. She contends that DCS did not make reasonable efforts to assist her, but that in any event, she substantially complied. Mother does not challenge the reasonableness of the requirements nor does

she contend that they were not related to remedying the conditions that led to removal. In our review of the permanency plans, we find that they were both reasonable and related to remedying the conditions that led to the children's removal.

The children were removed from Mother's custody on August 25, 2006, because of her instability and inability to provide proper supervision to the children. Mother's habitual drug use, repeated incarcerations¹⁰ and lack of a stable home created the conditions that led to removal of the children. The Department developed four permanency plans with Mother, all of which were signed by Mother and approved by the trial court. The permanency plans developed by DCS and Mother established tasks, such as completing and following the recommendations of alcohol and drug and parenting assessments, obtaining a stable place to live, and not incurring new criminal charges, that were reasonably related to the conditions that warranted removal of the children.

All four permanency plans established five desired outcomes and explained the tasks Mother needed to complete in order to achieve those outcomes.¹¹ We will examine the responsibilities associated with each and the evidence of Mother's compliance.

First, Mother was to become drug and alcohol free. In order to achieve this outcome, Mother was required to complete an alcohol and drug assessment, submit to random drug screen, provide proof of completion and results of drug screens, sign a release of information to allow DCS to obtain documentation from the appropriate provider, follow any and all recommendations deemed necessary by the appropriate provider, and attend intensive out-patient treatment. DCS provided and Mother completed two alcohol and drug assessments. The first, completed while Mother was incarcerated in September 2006, recommended Mother complete an intensive out-patient treatment program. Mother signed the release of information allowing DCS to obtain document from the provider and submitted to random drug screens. Mother tested positive for cocaine on September 28, 2006, and admitted that she would have tested positive for marijuana on February 22, 2007, April 30, 2007, and again on May 2, 2007. Mother was arrested on June 3, 2007, on drug-related charges. On November 24, 2007, however, Mother tested negative for drugs; this was the last time before trial that Mother was tested for drugs. There was some testimony that Mother may have started a treatment program at some point in March 2007, but she did not complete the program. DCS did not provide funding for the program and did not know whether Mother had begun any treatment programs. Prior to trial, Mother had applied for and filed a motion for a furlough in order to attend

¹⁰ Mother's criminal record, which was an exhibit at trial, indicates that prior to the children's removal Mother was arrested on October 23, 2003, and incarcerated for possession of marijuana as well as Schedule II and Schedule IV drugs. On June 21, 2004, Mother was arrested and pled guilty to theft; she was subsequently incarcerated after violating probation. Mother was again arrested on January 7, 2005, and incarcerated after pleading guilty to theft, contributing to the delinquency of a minor and criminal impersonation.

¹¹ While we recognize Tenn. Code Ann. § 36-1-113(g)(2) does not require substantial compliance with a plan's "desired outcomes," rather, it requires substantial compliance with a plan's statement of responsibilities, i.e., the actions required to be taken by the parent, *see State of Tenn. Dep't of Children's Services v. P.M.T.*, No.E2006-00057-COA-R3-PT, 2006 WL 2644373, at *8 (Tenn. Ct. App. Sept. 15, 2006), we note the "desired outcomes" in the permanency plans for categorization purposes.

a residential treatment program, “The Next Door,” but Mother’s furlough was denied; At the time of trial, Mother had filed a second furlough request that was pending. Mother completed all the tasks but one and, while completing treatment was a significant requirement, the record shows that Mother made progress toward becoming drug and alcohol free despite the lack of treatment as evidenced by Mother’s negative drug test in November 2007 and the lack of any drug related charges in the year before trial. We find that DCS failed to prove by clear and convincing evidence that Mother did not substantially comply with the parental responsibilities related to being drug and alcohol free.

The second desired outcome was for Mother to have a healthy and stable relationship with the children. Mother was required to complete a parenting assessment and attend and participate in family counseling. DCS applied for and received funding for Mother’s parenting assessment on four different occasions and scheduled the assessment for Mother, but Mother failed to attend the appointments and did not complete the parenting assessment until January 21, 2008; the next day, Mother was incarcerated where she remained through trial. The parenting assessment recommended in-home services for Mother, which could not be provided at the Rutherford County Jail where Mother was incarcerated. In the spring of 2007, Mother attended three of eight parenting classes, but did not complete the course. Then, while incarcerated from June to October 2007, Mother attended a program in the jail that included parenting training, but she stopped attending the program after a few classes because of a conflict she had with another participant. We find by clear and convincing evidence that Mother did not substantially comply with the parental requirements related to maintaining a healthy and stable relationship with the children.

The third desired outcome was for Mother to provide monetarily for the children. In order to accomplish this Mother was required to provide the basic needs for the children; maintain a stable living environment; maintain stable income; obtain and maintain insurance for the children to allow them to receive proper medical attention; have reliable transportation or arrange transportation to be able to provide basic and extended needs for the children and to provide DCS with a transportation plan; provide a safe environment for the children with appropriate supervision; pay court ordered child support; provide DCS with proof of housing; contact information and proof of income; and notify DCS of any address change, phone numbers, employment or contact information. Mother testified that when she was not in jail she was employed by Serv-Tech; Mother also testified that she provided two of her pay stubs from Serv-Tech to DCS. Amanda Kendall, however, testified that Mother never provided DCS with any pay stubs and Mother did not inform her that she was employed. Mother provided DCS with her mother’s phone number and address and instructed Ms. Kendall to communicate with her through her mother, however, Mother did not notify DCS when her address changed or when she became incarcerated. Mother provided DCS with a transportation plan in November 2006, but never updated the plan or secured reliable transportation. Mother did not have a driver’s license, nor did she ever attempt to get one; she relied mostly on her mother to provide transportation to visitation with the children. Mother did not obtain insurance for the children, a stable income or stable living environment for the children. Mother did not provide the basic needs for the children. Consequently, we find by clear and convincing evidence that Mother did not substantially comply with the parental requirements related to providing monetarily for the children.

The fourth desired outcome was for Mother to have a better understanding of parenting skills and her parenting needs regarding the children. To accomplish this, Mother was required to attend and participate in a parenting assessment, follow any and all recommendations of the assessment, sign a release of information to allow DCS to obtain appropriate paperwork, and provide proof of completion or progress notes to DCS. Mother completed the requirement that she sign a release of information allowing DCS to obtain necessary paperwork from the provider. We note that Mother attempted to complete parenting classes twice at a time when such classes were not an explicit requirement of the permanency plans; however, Mother failed to attend even half of the required number of classes and she never completed a parenting course. DCS attempted to provide Mother with a parenting assessment on four different occasions, even scheduling the appointments for Mother, but Mother failed to attend or attempt to reschedule the appointments. Mother did not complete the assessment until January 21, 2008, nearly seventeen months after the removal of the children. The following day, Mother was incarcerated where she remained through the date of trial. The assessment recommended in-home services to address Mother's lack of parenting skills. Ms. Kendall testified that the jail where Mother was located did not offer and DCS was unable to provide the recommended services to Mother while she was incarcerated. While Mother contends that her current incarceration prevented her from following the recommendations of the parenting assessment and, as a result, we cannot find that she failed to substantially comply with this requirement of the permanency plan, we disagree. A year and a half went by after the children were removed from Mother's custody before she made any attempt to complete the parenting assessment and then once completed she was "prevented" from following the assessment's recommendations by her own illegal actions. We find that the evidence clearly shows that Mother did not substantially comply with the parental responsibilities related to understanding how to be an appropriate parent for the children.

The fifth desired outcome was for Mother to comply with all orders of the court and rules of probation. Mother was required to understand and abide by all court orders, not incur any new criminal charges, understand and abide by all rules of her probation, and notify DCS of any findings by the court and rules of probation. Mother incurred new criminal charges on four occasions after the children were removed from her custody. Mother's fourth arrest and subsequent incarceration on January 22, 2008, also violated the terms of her probation. Mother failed to notify DCS when she was arrested and incarcerated and did not provide DCS with any of the court's findings or the rules of her probation. We find that the evidence clearly shows that Mother did not substantially comply with the parental responsibilities related to complying with court orders.

The foregoing evidence clearly indicates that Mother failed to substantially comply with all of the parental responsibilities outlined in the permanency plans; consequently, we affirm the trial court's termination of Mother's parental rights on the ground of substantial noncompliance with the permanency plans.

D. Persistence of Conditions

Tenn. Code Ann. § 36-1-113(g)(3) sets forth the following ground for terminating a parent's parental rights:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and: (A) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist; (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

A termination proceeding based on the persistence of conditions ground requires a finding by clear and convincing evidence of all three statutory factors. *In re Valentine*, 79 S.W.3d at 549.

The trial court made the following finding with respect to this ground for termination:

This Court finds that clear and convincing evidence supports termination of [Mother's] parental rights on the ground of persistent conditions.

It has been over eighteen months since the Juvenile Court's Protective Custody Order to remove these children. At the time of this hearing, it has now been over two years. They were removed because of the mother's residential instability and homelessness, and the abandonment by the father. There was also drug exposure by the mother.

The court finds today that the mother is still unable to provide a safe and suitable home for the benefit of the child[ren], and has failed to become or remain drug-free. She has failed to create a safe environment and home for this child. Therefore, the conditions that led to the removal still persists.

Mother takes issue with the trial court's determination that her parental rights should be terminated based on the persistence of conditions which led to the children's removal. Mother points to the fact that she had not tested positive for drugs since May 2007, and that she was not homeless at the time of trial since she was incarcerated. Mother characterizes the trial court's decision with respect to persistence of conditions as relying merely on the fact that she was incarcerated as grounds for terminating her parental rights, which Mother asserts is contrary to the legislative intent of Tenn. Code Ann. § 36-1-113(g)(6).¹²

¹² Tenn. Code Ann. § 36-1-113(g)(6) allows initiation of parental termination if "the parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court." The court in *State of Tenn., Dep't of Children's Services v. C.H.K.*, 154 S.W.3d 586 (Tenn. Ct. App. 2004) perm. appeal den. Nov. 8, 2004, addressed incarceration as a factor in determining whether persistence of conditions existed. In *DCS v.* (continued...)

We do not find that Mother's characterization of the trial court's determination accurately reflects the trial court's order. The trial court found that the children were removed because of Mother's "instability," which derived in part from Mother's accrual of new criminal charges and incarcerations. Consequently, it was Mother's habitual illegal behavior which led to repeated incarcerations along with the fact that Mother had not resolved her drug addiction or established a stable home for the children that were the bases of the trial court's finding that the conditions which led to the children's removal – instability and lack of supervision of the children – persisted, not the mere fact that Mother was incarcerated at the time of trial.

Having determined above that DCS made reasonable efforts to reunite Mother and the children, we turn to the three statutory factors required to terminate a parent's rights on the ground of persistence of conditions. The trial court did not explicitly state that it found there was little likelihood that the conditions would be remedied at an early date or that the continuation of the parent and child relationship diminished the children's early integration into a safe, stable and permanent home. We find there is sufficient evidence in the record to find by clear and convincing evidence that all three elements exist.

First, as discussed above, the children were removed from Mother's custody because she was unable to provide a stable home or proper supervision due to drug use and other illegal behavior which led to frequent incarcerations, sometimes for months at a time. We find that the evidence does not clearly and convincingly support the trial court's finding that Mother has failed to become drug-free. While Mother has failed to complete any drug treatment programs, the record shows that Mother had not tested positive for cocaine since September 2006, and she had not tested positive for marijuana since May 2007; her last drug screen, on November 24, 2007, was negative. Unlike the past, Mother's current incarceration is not based on any drug-related charge and Mother had been incarcerated for approximately eight months at the time of trial and not likely to be on drugs while in jail. While Mother's past behavior indicates that without treatment she may fall back into her bad habits, the evidence does not indicate that she continues to be dependent on drugs. To the extent the trial court's determination that the conditions that led to removal persisted based on Mother's failure "to become or remain drug-free," it is modified. Mother did not, however, make similar improvement with respect to the other conditions which led to the removal of the children. In the eighteen months following removal of the children, Mother continued to incur new criminal charges, the latest of which sentenced Mother to four years incarceration that she was serving at the time of trial. Mother's unremedied habitual incarceration leaves her unable to provide proper supervision or a safe and stable home for the children. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A).

¹²(...continued)

C.H.K., the trial court's determination that the mother's parental rights should be terminated based on the ground of persistence of conditions was reversed by the Court of Appeals because the Court determined that the children were removed because the mother neglected the children and "the legislature did not intend that the incarceration of a parent constitutes a condition which would cause the child to be subject to abuse or neglect," except under the specified conditions of Tenn. Code Ann. § 36-1-113(g)(6). *Id.* at 592. In making its determination the Court held that Tenn. Code Ann. § 36-1-113(g)(6) "manifests an intent that there must be proof that the parent is incarcerated under a sentence of at least ten years before the mere fact of incarceration will constitute grounds for termination of parental rights." *Id.*

Second, at the time of trial Mother had served the first eight months of a four-year sentence. Ms. Kendall, the DCS case worker, testified that there were no other tasks Mother could complete from jail. Mother had applied for a furlough for drug treatment, but her furlough was denied. Since Mother was prevented from completing any of the recommendations from her alcohol and drug and parenting assessments by her illegal actions which led to her being incarcerated one day after the assessments were done, she will likely have to complete new assessments upon her release and then complete the recommendations, which would take at least six months as indicated in the permanency plans previously developed for Mother. As a result, there is little likelihood that the conditions which led to removal would be remedied at an early date. *See* Tenn. Code Ann. § 36-1-113(g)(3)(B).

Third, the record shows that, while the children love Mother, they were very happy and had developed a strong bond with their pre-adoptive foster parents. Mother told DCS that she did not want to visit with the children while she was in jail, but she did write letters to them. Just before trial in September 2008, Mother asked to visit with the children, which was the only visit the children had with Mother during the previous eight months. These facts clearly demonstrate that the continuation of the parent-child relationship diminishes the children's early integration into their pre-adoptive home. *See* Tenn. Code Ann. § 36-1-113(g)(3)(C).

Based on the above, we affirm, as modified, the trial court's determination that the conditions which led to the removal of the children existed two years later, there was little likelihood that the conditions would be remedied at an early date, and that continuation of the parent and child relationship greatly diminished the children's chances of early integration into a safe, stable and permanent home.

E. Best Interest of the Children

Once a ground for termination has been proven by clear and convincing evidence, the trial court must then determine whether it is the best interest of the child for the parent's rights to be terminated, again using the clear and convincing evidence standard. The legislature has set out a list of factors for the courts to follow in determining the child's best interest. These factors are:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

The foregoing list is not exhaustive, and the statute does not require every factor to appear before a court can find that termination is in a child's best interest. *See In re S.L.A.*, 223 S.W.3d 295, 301 (Tenn. Ct. App. 2006) (citing *State of Tennessee Dep't of Children's Servs. V. T.S.W.*, No. M2001-01735-COA-R3-CV, 2002 WL 970434 at *3 (Tenn. Ct. App. May 10, 2002); *In re I.C.G.*, No. E2006-00746-COA-R3-PT, 2006 WL 3077510 at *4 (Tenn. Ct. App. Oct. 31, 2006)). While Mother does not challenge the trial court's determination that termination of Mother's parental rights was in the best interest of the children, the trial court's best interest determination is a conclusion of law that we review *de novo* with no presumption of correctness. *See* Tenn. R. Civ. P. 13(d).

The record clearly shows that in the two years since the children were removed from her custody, Mother has not made any lasting changes in her lifestyle or conduct. *See* Tenn. Code Ann. §§ 36-1-113(i)(1), (2). When the children were removed, Mother was unable to provide a stable home for or appropriate supervision to the children, a situation that continued at the time of the trial. *See* Tenn. Code Ann. §§ 36-1-113(i)(2), (6). On the date of removal, Mother had left the children with a neighbor without asking the neighbor if the children could stay there and without leaving any contact information. *See* Tenn. Code Ann. § 36-1-113(i)(6). There was testimony that Mother often left the children with friends or relatives who were limited in the extent of care and supervision that they could provide the children or who were known to use drugs. *See* Tenn. Code Ann. § 36-1-113(i)(6), (7). Mother admitted to using drugs and never completed treatment for her problem. *See* Tenn. Code Ann. § 36-1-113(i)(7). Mother continued her habit of illegal behavior that resulted in frequent incarcerations, leaving her children without the stability and monetary support that they need. *See* Tenn. Code Ann. § 36-1-113(i)(6). This constant changing of caregivers of the children at this stage of their life has a detrimental effect on them. *See* Tenn. Code Ann. § 36-1-113(i)(5). By not recognizing the detrimental impact her actions have on the safety and stability of her children, Mother has placed her own needs and desires above the children and demonstrated to this Court that she clearly is not capable of effectively and safely parent the children. *See* Tenn. Code Ann. § 36-1-113(i)(8).

The record does not show that a strong bond exists between Mother and the children. *See* Tenn. Code Ann. § 36-1-113(i)(4). The record shows that Mother missed supervised visitation with the children in January, February and March of 2007. *See* Tenn. Code Ann. § 36-1-113(i)(3). Prior to her most recent incarceration in January 2008, Mother was exercising unsupervised visitation, but between January 22, 2008, and the time of trial eight months later, there was only one visitation between Mother and the children and that was in September just before the trial date. *See id.* While Mother wrote letters to the children and DCS testified that the letters were appropriate, the record clearly shows that the children have established a strong bond with their foster parents who wish to adopt them. The children told the DCS case worker, Ms. Kendall, that while they love Mother, they would like to be adopted by their foster parents.

The foregoing evidence demonstrates clearly and convincingly that termination of Mother's parental rights is in the best interest of the children.

IV. CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed, as modified herein.

Costs of the appeal are taxed to Mother for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE